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Supreme Court of the United States

OCTOBER TERM, 1953

No. 408

SIDNEY S. HENIS, HENRY H. ABRAMS, HAROLD PRICE and PAULETTE M. PAUL,

Petitioners,

THOMAS C. EGAN, HARRY R. AXELROTH, FRANCIS E. WALTER, TUCKER, MAYS, CABELL & MOORE, a Partnership, BOYLE, FELLER, STONE & McGIVERN, a Partnership, JAMES P. REEVES, HUGH A. KELLY, FRED C. RUDGE, JOHN V. ROBINSON, EDWARD GOULD, LEONARD L. COWAN and WILLIAM P. DOYLE,

Respondents.

IN THE MATTER

of

CENTRAL STATES ELECTRIC CORPORATION, a Corporation,

Debtor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RALPH MONTGOMERY ARKUSH,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Petitioners,

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CENTRAL STATES ELECTRIC CORPORATION, a Corporation,

Debtor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

[Emphasis in quoted matter has been supplied]

Petitioners above named pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit entered on July 16, 1953, in the proceeding for reorganization of the debtor above named.

Opinions Below.

The opinion of the District Court (R. 10) is reported at 112 F. Supp. 281. The opinion of the Court of Appeals (R. 48) is not yet reported.

Jurisdiction.

The order of the Court of Appeals was entered on July 16, 1953 (R. 52). The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254 (1).

Question Presented.

In a corporate reorganization proceeding under Chapter X of the Bankruptcy Act, 11 U. S. C. A. §501, *et seq.*, where, in the discharge of its statutory function as advisor to the District Court and at the request of the judge, the Securities and Exchange Commission has investigated the conduct of applicants for allowances and has reported to the judge that

> (1) certain applicants, counsel for a stockholders committee, traded in stock of the debtor's subsidiaries which had substantial claims against the debtor and which with the debtor constituted a single enterprise; and
>
> (2) certain applicants, two stockholders committees and their counsel, concealed the true facts as to the sponsorship and financing of their committees, and, while purporting ostensibly to represent, one the junior preferred, and the other the common, stock of the debtor, were actually sponsored, financed and directed by a group having conflicting interests in both classes of stock and in expected underwriting profits;

and the Commission has recommended that, in accordance with the express provisions of the statute (§§249 and 211, 11 U. S. C. A. §§649 and 611) and the principles of law governing the conduct of fiduciaries, said applicants be denied any allowances, but the judge has refused to follow the recommendation and entered an order granting allowances to said applicants; and where neither the trustees of the debtor nor any other party who had appeared in the District Court has sought leave to appeal from the said order—the Commission itself being forbidden by statute so to do—and where the new company formed on reorganization has no interest in the fund reserved for the payment of allowances since the undisposed residue of said fund is distributable directly to holders of the senior preferred stock of the debtor, is it an abuse of the discretion vested in the Court of Appeals under §250 of the statute, 11 U. S. C. A. §650, for that court—although simultaneously holding as to a companion case in the same opinion that trading in stock of the debtor's subsidiaries as mentioned in subparagraph (1) above is ground for denial of allowances and giving no consideration to the merits of the objections to the applications mentioned in subparagraph (2) above—to deny a petition for leave to appeal filed by holders of the senior preferred stock, solely on the ground that they have not intervened in the District Court to reiterate the Commission's objections to the order?

Statute Involved.

The pertinent statutory provisions are printed in Appendix A (*infra*, pp. 24-26).

Statement.

Central States Electric Corporation filed a petition for reorganization under Chapter X of the Bankruptcy Act in the District Court of the United States for the Eastern District of Virginia on February 26, 1942 (R. 10). A plan of reorganization* was approved and confirmed and, as of June 28, 1951, consummated (R. 12-13). The present application relates solely to the allowances granted to, respectively, (1) counsel for the 7% preferred stockholders committee, and (2) counsel for, and members and secretary of, the Kelly 6% preferred stockholders committee and the Doyle common stockholders committee.

The Securities and Exchange Commission at the request of the District Court filed a memorandum containing a full and careful analysis of the activities of all of the applicants for allowances (R. 16). The allowances to respondents were made by order (R. 5) of the District Court (Sterling Hutcheson, D. J.) entered on April 23, 1953, in disregard of recommendations of the Securities and Exchange Commission that no allowances be made to any of the respondents (R. 22-23).

The basis of the Commission's recommendation in regard to the application of counsel for the 7% preferred stockholders committee was that some of them or their associates or immediate families had traded in stock of the debtor's subsidiaries (R. 17-18) and thereby the applicants had come within the express terms of §249 of the act, 11 U. S. C. A. §649, prohibiting an allowance to

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* A copy of the plan appears in the files of this Court (Record, pp. 260-278, *Central States Electric Corporation* v. *Austrian*, 340 U. S. 917). Certain phases of related proceedings have been before this Court (*Williams* v. *Austrian*, 331 U. S. 642; *Austrian* v. *Williams*, 344 *id.* 909).

fiduciaries who have purchased or sold "claims against, or stock of, the debtor." The Commission objected to the applications of the Kelly and Doyle committees and counsel because those committees had failed to comply with the express terms of §211 of the statute, 11 U. S. C. A. §611, requiring them to disclose "the pertinent facts and circumstances in connection with [their] employment * * * and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act" (R. 29) and because those committees had concealed their connection with a group having conflicting interests in the 6% preferred, as well as the common, stock of the debtor and in expected underwriting profits to be realized in the reorganization (R. 29).

As to the applications of the counsel for the 7% preferred stockholders committee the facts are not in dispute. Respondent Egan, the wife of respondent Axelroth and members of the respondent firm of Tucker, Mays, Cabell & Moore and the wife and son of another one of the members, traded in stock of American Cities Power and Light Corporation and Blue Ridge Corporation (R. 27). The debtor owned 70% of the Class B (common stock) of American Cities and had a proprietary interest in, and control of, 73% of Blue Ridge common stock by owning outright 31% thereof and, through American Cities, part ownership of 42% (R. 25). American Cities had a claim of about $11,000,000, and Blue Ridge a claim of about $14,000,000, against the parent company, the debtor, which claims were the subject matter of plenary suits and were eventually settled, American Cities receiving $185,000 and Blue Ridge $315,000 (R. 25).

Counsel for the 7% preferred stockholders committee applied for an allowance of $750,000 and expenses. In its

memorandum submitted to the District Judge the Securities and Exchange Commission said (R. 51-52):

> "The operations of the subsidiaries, while not intermingled, were supervised by a common board of directors and common officers and a joint staff. The trustees of the Debtor were two of the five directors at all times. The Debtor and its subsidiaries maintained separate corporate existence and had separate accounts and books. However, the system was considered by all the parties as a single family of companies and it was recognized that the Debtor had a preponderant and controlling interest in the two subsidiaries. By reason of leverage, any slight change in the market value of the subsidiaries' holdings was reflected markedly in the asset value of the debtor and the market prices of its outstanding securities. Numerous matters regarding the subsidiaries were brought before the Court and, in fact, the claims for compensation in substantial measure are based upon service in connection with these matters. The 7% Preferred Committee, among others, felt American Cities and Blue Ridge to be so important that they urged representation for themselves on the boards of these companies. They also sought and obtained continuous information regarding portfolio changes in the two subsidiaries."

Under the circumstances as set forth above, the Commission urged that §249 of the Bankruptcy Act, 11 U. S. C. A. §649, expressly prohibited the award of allowances to fiduciaries who had traded in stock of the subsidiaries (R. 17-18). The District Judge did not agree and held, the express provisions of the statute notwithstanding, that it was within his discretion to make the awards. He allowed counsel for the 7% preferred stockholders committee a fee of $250,000 (R. 18; 22).

While the Court of Appeals did not discuss the merits of the objections to this allowance in its opinion dealing with petitioners' application, it did hold in that part of the *same opinion* in which it denied the application of one O'Brien for compensation as a member of the 7% preferred stockholders committee for leave to appeal from the part of the order which denied him compensation (R. 50-51):

> "Although the District Judge did not base the denial of compensation to O'Brien on the trading by his firm in the stock of the subsidiaries, we agree with the statement in the memorandum filed in the court below in behalf of the Securities and Exchange Commission that this was ground for denial. See In re Midland United Co. [64 F. Supp. 399, 416; aff. 1947, 3 Cir., 159 F. 2d 340, 345] * * * And, while the relationship between a corporation and its subsidiaries may in some cases not always be so close as to bring trading in their securities within the inhibition of the statute, we think there can be no question as to its doing so here, where the subsidiaries were so clearly part and parcel of a single enterprise that in approving the plan of reorganization we said of it: (183 F. 2d 879, 884) 'What is really accomplished by the plan is not the liquidation of Central, but the replacement of the existing three-tier structure (with the leverage therein inherent) by a new company with a single class of securities, common stock' ".

As to the applications of the Kelly and Doyle committees and counsel the Court of Appeals did not touch on the merits. In order, however, for this Court to appreciate the importance of the present application it will be helpful to make brief reference to the facts. The testimony taken at the hearings on allowances, together with depositions which had been taken in a stockholders' suit in the South-

ern District of New York, revealed the following facts as to the sponsorship, financing and directing of the Kelly committee and the Doyle committee (R. 28-29), as found by the Commission in its report to the District Court.

Both committees were formed at the instance of a customer's man named Buckner, an investment counsellor named Gumperz and Gumperz' attorney, Berner. Buckner owned 6% preferred and common stock of the debtor and represented stockholders of both classes. His firm acted as broker for clients of Gumperz, who himself owned common stock and who had clients owning common stock, clients owning 6% preferred stock and clients owning stock of both classes. At Gumperz' request Berner formed Sacramento Corporation, which financed both committees and Berner by the sale to a corporation owned by Berner's mother-in-law of options granted by holders of 6% preferred and common stock to purchase their stock. All payments from the fund so raised were subject to approval by Buckner, Gumperz and a holder of common stock. These three were also to pass upon all steps to be taken in the proceeding. The records of counsel for the Kelly and Doyle committees showed that they consulted with Buckner, Berner and Gumperz more often than with their own committees and followed the advice, suggestions and directions of the Buckner-Berner-Gumperz group on all important questions. The same group, which was interested in underwriting a plan of reorganization, had inspired certain litigation in the Court of Appeals and elsewhere for the purpose of delay.

The statement filed in the reorganization proceeding by the Kelly committee pursuant to §211 of the Bankruptcy Act, 11 U. S. C. A. §611, stated as the names of the persons "at whose instance, directly or indirectly, * * * the com-

mittee was organized or formed or agreed to act" only the names of certain clients of Gumperz who, at his suggestion had executed formal requests to the committee to act. The statement made no mention of Buckner, Gumperz, Berner or Sacramento Corporation. The §211 statement filed by the Doyle committee mentioned only Buckner's firm but not Gumperz, Berner or Sacramento Corporation. Neither of the statements mentioned the arrangements that had been made for the payment of both committees' expenses and counsel fees. The facts as to the sponsorship, financing and directing of the two committees were disclosed neither in the §211 statements nor in the solicitation material sent to stockholders. The relationship of the Buckner-Berner-Gumperz group to the two committees and to prospective underwriting firms and to the litigants in the dilatory litigation above mentioned, was not disclosed to the District Court or to the securityholders until the taking of depositions in the stockholders' suit and in the hearings on allowances.

Despite the recommendation of the Securities and Exchange Commission that no allowances be granted to the Kelly committee, its New York counsel, the Doyle committee or its Chicago counsel (R. 29), the District Judge, while admitting that "it would appear that some of those participating behind the scenes did not disclose their full status to the Court nor to those who acted for them in a representative capacity" (R. 16), made awards to the two committees and their counsel (R. 23).

In the District Court the reorganization trustees took no position on respondents' applications, nor was objection raised by anyone other than the Commission. Under date of November 2, 1951, notice had been given to the debtor's stockholders and creditors of the hearing to be held on the

applications for allowances (R. 34). The facts, however, on the basis of which the Commission recommended that no allowances be granted to respondents were brought to light after the giving of that notice and as a result of the investigation by the Commission and would not have been gleaned from an examination of the District Court files at the time of the notice.*

The new company formed pursuant to the reorganization plan, Blue Ridge Mutual Fund, Inc., has no interest in the applications for allowances, since the entire residue, if any, of the fund reserved for the payment of allowances is distributable directly to the holders of the 7% preferred stock (R. 3). The holders of that class of stock have already received payment of $198 per share in stock of the new company on account of the par value and dividends accrued to June 28, 1951, leaving a deficiency of $66.09 per share plus 7% per annum thereon from that date (R. 3; 33). Pursuant to order of the District Judge the 7% preferred stock certificates have been stamped with notation of the partial payment and of the amount of the deficiency (R. 33-34).

Under §208 of Chapter X, 11 U. S. C. A. §608, the Commission was not permitted to appeal, or file a petition for leave to appeal, from the parts of the order overruling its recommendations. That order was entered on April 23, 1953 (R. 5-7). No petition for leave to appeal having been filed by the trustees or anyone else, petitioners, being the registered holders or beneficial owners (R. 3; 44-45; *cf. Horowitz* v. *Kaplan*, 1951, 1 Cir., 193 F. 2d 64, 66) of

* This is shown by the record as to the applications of the Kelly and Doyle committees and counsel (R. 28-29). As to the applications of counsel for the 7% preferred stockholders committee it is not disputed, and the papers filed in the District Court show, that their trading in stock of the subsidiaries was not disclosed until a supplemental statement under §249, 11 U. S. C. A. §649, was filed at the request of the Commission after the giving of the notice.

2,011 shares of 7% preferred stock, on May 15, 1953, applied for leave, pursuant to §250 of the Bankruptcy Act, 11 U. S. C. A. §650, to appeal from the parts of the order making allowances to the present respondents, setting forth in their petition in summary form the objections which had been urged in the District Court by the Commission (R. 27-29). The total amount of the allowances here in question is equal almost exactly to $4 per share on the 68,800 outstanding shares of that class of stock (R. 3).

Specifications of Errors to be Urged.

The Court of Appeals erred:

(1) In denying to petitioners leave to appeal from the part of the order of the District Court granting an allowance to counsel for the 7% preferred stockholders committee in contravention of the express prohibition contained in §249 of the Bankruptcy Act, 11 U. S. C. A. §649;

(2) In denying to petitioners leave to appeal from the parts of the order of the District Court granting allowances to the Kelly and Doyle committees and counsel, although those committees had concealed the facts as to their sponsorship and financing, in contravention of the express requirements of §211 of the act, 11 U. S. C. A. §611, and while ostensibly purporting to represent, one the 6% preferred, the other the common, stock of the debtor, were actually sponsored, financed and directed by a group having conflicting interests in both classes of stock and in expected underwriting profits;

(3) In holding that, in order to have legal standing to appeal, petitioners should have intervened in the District Court to voice the same objections which the Commission had already made in its report to that court.

Reasons for Granting the Writ.

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; to wit, that stockholders of a debtor in a Chapter X reorganization proceeding have no legal standing to appeal from a District Court order overruling recommendations of the Securities and Exchange Commission, although based on express statutory enactments and the principles of law governing conduct of fiduciaries, for the sole reason that the stockholders have not appeared in the District Court and voiced the same objections that had been urged by the Commission, when no one else had sought leave to appeal—the Commission by statute being forbidden to do so. The question is one of wide import in the administration of the Bankruptcy Act (*cf. New York v. N. Y. N. H. & H. R. R. Co.*, 345 U. S. 901; *Manufacturers Trust Co.* v. *Becker*, 338 *id.* 304; *United States* v. *Knight*, 336 *id.* 505; *Goggin* v. *California Labor Division*, 336 *id.* 118; *Williams* v. *Austrian*, 331 *id.* 642; *Gardner* v. *New Jersey*, 329 *id.* 565; *Vanston Committee* v. *Green*, 329 *id.* 156; *Heiser* v. *Woodruff*, 327 *id.* 726; *Meyer* v. *Fleming*, 327 *id.* 161; *American Surety Co.* v. *Sampsell*, 327 *id.* 269).

The issuance of the writ here prayed for and the reversal of the decisions below will be a warning to fiduciaries and federal courts acting in Chapter X cases, that this Court is as vigilant as it has been in the past (*Woods* v. *City National Bank Co.*, 312 U. S. 262, 267-9), to insist upon the strict enforcement of the statutory provisions and the principles of law governing the conduct of fiduciaries in corporate reorganizations under the act. The wide public distribution of corporate securities, the ease with which self-constituted committees are able to procure lists of security-

holders and solicit authorizations to represent them, the opportunities of committees to obtain inside information and to influence the course of reorganizations by negotiation or litigation—make it of the highest public interest that the ethical standards set by the act and by the rules of law for committee members and counsel not be relaxed.

The words and action of the Court of Appeals in the present case indicate a singular lack of awareness of the wide national importance of maintaining honest administration of the reorganization statute. The court, instead of sweeping away the flimsy procedural points raised by respondents in opposition to petitioners' application, seems to have gone out of its way to justify itself for not reviewing the glaring errors of the District Judge. This, although in the same opinion the court made a ruling on a companion case which, had it granted the appeal in the present case, necessarily would have resulted in the reversal of the lower court's action on allowances constituting 91% of the total here in question!

2. In the interest of enforcing the prophylactic provision of §249, annexing a sanction to "inside trading" by fiduciaries in Chapter X proceedings, the error committed in this case by the District Court, and in effect acknowledged to be such by the Court of Appeals in the opinion at bar dealing with a companion petition, should not stand uncorrected.

"Inside trading" by fiduciaries employed in reorganization cases was one of the evils which Chapter X was designed to stamp out, or in any event to abate by the penalty provided in §249. The action was said to be in the main a codification of the rule already imposed by the courts in proceedings under §77B, 11 U. S. C. A. §207 *et seq.* (Report from Senate Committee on the Judiciary to

Accompany H. R. 8046, S. R. 1916, 75th Cong., 3d Sess., p. 38; *cf. In re Paramount-Publix Corp.*, 1935, S. D. N. Y., 12 F. Supp. 823, 828). Chapter X was enacted in large part as the result of recommendations of the Securities and Exchange Commission made to Congress* pursuant to section 211 of the Securities Exchange Act of 1934, 48 Stat. 909, 15 U. S. C. A. §78 ii (Report from Senate Committee on Judiciary, *supra*, p. 20).

The Commission in its Report had spoken unequivocally as to "inside trading".

> "* * * It is fair to say that the philosophy of the 'street' has permeated committees and lowered their standards of trusteeship in this regard. Unless such standards are restored one of the most conspicuous and flagrant conflicts of interest between committees and the security holders whom they represent will persist. And as long as such conflicts of interest are present the true functions of committees in protection of their beneficiaries will be subverted." Pt. 2, p. 514.
>
> "* * * Such prohibition must include trading by counsel to the committee * * *. Likewise, it must include trading by affiliated interests of committee members. Otherwise the rule will be ineffective since normally the committee member himself does not trade * * *" Pt. 2, p. 351.

Although §249 was called to the attention of the District Judge by the Commission, he refused to follow the decision in which the Third Circuit Court of Appeals interpreted the section literally to cover trading in stock of a subsidiary owning a claim against its parent company, a debtor in reorganization (*In re Midland United Co.*, 159 F. 2d 340, 345). As above pointed out the Court of Appeals for the Fourth Circuit is in accord with that interpretation.

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* Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees. See, particularly, Parts 1, 2 and 8.

The purchases by partners of the fiduciaries and members of their immediate families are attributable to them (*In re Mountain States Power Co.*, 1941, 3 Cir., 118 F. 2d 405; *In re Inland Gas Corp.*, 1947, E. D. Ky., 73 F. Supp. 785, 788).

3. Likewise, the prevention of concealment by persons acting in a fiduciary or representative capacity in Chapter X proceedings of their true interests and affiliations is of the highest importance. The abuse in this case of the District Court's discretion by the award of allowances in the face of flagrant non-compliance with §211, 11 U. S. C. A. §611, should not stand uncorrected.

In enacting §211, U. S. C. A. §611, the Congress obviously intended to require all committees to disclose the identity of their real backers. The Commission's Report had shown that most of the sinister phases of committee practices resulted from conflicts of interest (Pt. 2, *passim*). Committees organized by the management of the debtor or by the banking house of original issue or by entrepreneurial groups seeking control of the reorganization could not render single-minded devotion to the cause of their beneficiaries. For committees to pay mere lip-service to the statute by mentioning some nominal or dummy sponsors, without revealing the true circumstances of their formation, is not only a non-compliance with the statute but a fraud on the court and the securityholders. Although the facts in this regard were called to the attention of the District Judge by the Commission he alluded to them only in the most general terms, if at all (R. 16).

4. The prevention of dual or conflicting representation on the part of fiduciaries acting in Chapter X proceedings is a matter of wide general import, as has been heretofore

recognized by the granting of certiorari (*Woods* v. *City National Bank Co., supra*).

The affiliation of committee members with holders of securities junior or senior in interest to the class represented by the committee was pointed out by the Commission's Report as one of the evils not to be tolerated (Pt. 2, pp. 517, *et seq.*).

> "* * * Security holders are entitled to representation in reorganizations by persons who are interested solely in the securities for which they are acting, and who have no conflicting interests which could influence their advocacy of the cause of security holders." Pt. 2, p. 519.

The District Judge alluded in general terms to the existence of what he called "overlapping interests", but failed to recognize the far-reaching importance of enforcing the prophylactic rule denying compensation to faithless fiduciaries (*Woods* v. *City National Bank Co.*).

5. Since the Securities and Exchange Commission is forbidden by statute to appeal in a Chapter X proceeding, it is of general importance in the interest of honest and efficient administration of the act that, when no one who appeared in the District Court seeks leave to appeal, securityholders who did not so appear should be permitted to appeal from an order overruling the recommendations of the Commission based on express statutory enactments or principles of law governing the conduct of fiduciaries.

It is now established practice for the Commission to assume the burden of investigating applications for allowance in important Chapter X proceedings and opposing those deemed excessive or unlawful. The Commission is "the statutory advisor to the court" (*Manufacturers Trust Co.* v. *Becker*, 338 U. S. 304, 315).

In its report to Congress for 1952 the Commission emphasized the importance of its function in regard to fee applications generally and mentioned the very applications here in question:

> "One of the Commission's principal activities in Chapter X proceedings has continued to be its endeavor to assure adherence to the high standard of conduct required of fiduciaries. * * *
>
> * * * * * *
>
> The Commission in its advisory capacity makes specific recommendations to the courts respecting allowances for fees and expenses. *Ordinarily the Commission is the only party in the proceeding in a position to present impartial views to the judge on this subject. Even the independent trustee has an interest in the outcome of the fee hearing.* * * *
>
> In the proceedings involving *Central States Electric Corporation* * * *, the Commission recommended no allowances because of special circumstances. In three cases these recommendations were documented in detailed appendices to the memorandum. In one situation the Commission urged that a group of applicants were subject to a conflict of interest because the sponsors of their committees were interested in junior preferred stock and common stock as well as in underwritings. It was also pointed out that there had been a failure to disclose the true sponsorship of the committees as required by the statute. In another instance, the Commission took the position that purchases or sales of the stock of subsidiaries of the debtor by counsel for a committee, and purchases or sales of such stock or stock of the debtor by the wife of a committee member, or committee counsel, resulted in the prohibition of any allowance under section 249 or under equitable principles applicable to fiduciaries. * * *"

18th Annual Rep. 1952, 83rd Cong. 1st Sess.; H. Doc. No. 20, pp. 153, 154, 155.

See also, 6th Ann. Rep., 1940, pp. 62-64; 7th Ann. Rep., 1941, pp. 46-47; 10th Ann. Rep., 1944, p. 111; 12th Ann. Rep., 1946, pp. 86-87; 13th Ann. Rep., 1947, pp. 98-99; 14th Ann. Rep., 1948, pp. 85-87; 15th Ann. Rep., 1949, pp. 138-141; 16th Ann. Rep., 1950, pp. 120-124; 17th Ann. Rep., 1951, pp. 126-128.

When a District Court disregards the recommendations of the Commission—particularly when the question is not the amounts to be awarded, but whether fiduciaries by their conduct have forfeited their claim to any award at all—the appellate courts should be alert to review the matter. The hands of the Commission should be upheld by the appellate courts in matters of such prime importance to the administration of the Bankruptcy Act as the enforcement of rigid standards for the conduct of fiduciaries.

6. It would be harmful to the administration of corporate reorganizations generally if the insistence in this case by the Court of Appeals on a useless legal formality as a condition precedent of petitioners' "legal standing" were to stand uncorrected.

If the court, by its decision, meant that petitioners should have participated in the hearings on allowances held by the District Court in order to have a legal standing to appeal, its decision weakens the administration of the Bankruptcy Act, for the investigation and probing of fee applications are primarily the work of the Commission, and individual security holders should not be required or encouraged to duplicate this work. If, on the other hand, the Court of Appeals meant that these petitioners should have appeared in the District Court merely to make a

motion for a rehearing on points which had been thoroughly briefed and urged by the Commission and considered by the court, the appellate court was permitting a useless formality to stand in the way of the review of substantial and far-reaching errors.

No one questions the common law rule generally applicable that parties to a writ of error must have been parties to the judgment below (*Payne* v. *Niles,* 61 U. S. 219). But entirely different considerations apply to a reorganization proceeding under Chapter X. There any creditor or stockholder has "the right to be heard on all matters arising in" the proceeding (§206, 11 U. S. C. A. §606). "The right conferred by §206 is absolute and unlimited" (6 Collier on Bankruptcy, 14th ed., ¶9.23, p. 2895). "Courts have liberally construed this language as authorizing appeals" (*Young* v. *Higbee Co.,* 324 U. S. 204, 210; see, also, *In re Keystone Realty Holding Co.,* 1941, 3 Cir., 117 F. 2d 1003, 1005).

Thus, by the express terms of the statute, creditors and stockholders* of the debtor are *ipso facto* quasi-parties to the proceeding whether or not they appear in court. The common law rule urged on the Court of Appeals by respondents in opposing petitioners' application, and accepted by that court, is not an ironclad procedural requirement in reorganization cases. For example, in *Dudley* v. *Mealey,* 1945, 2 Cir., 147 F. 2d. 268, 270, a creditor who had not

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* Petitioners are "stockholders" of the debtor as defined in §106(12) of the act, 11 U. S. C. A. §506(12). (The statement in the petition for leave to appeal, R. 26, that "the debtor and Blue Ridge merged" was erroneous.) The debtor is an existing corporation. Its estate still comprises substantial assets and its 7% preferred stock is being traded and is being transferred on the books of its agent (R. 35; 42-43). The fact that part of the assets have been distributed to the senior preferred stockholders does not affect their status as "stockholders" (*Cf.* 6 Collier on Bankruptcy, ¶2.16; *In re Arcadia Furniture Co.,* 1935, W. D. Mich. S. D., 12 F. Supp. 477).

appeared in the District Court was permitted to appeal from an order approving a reorganization plan under Chapter X.

Particularly should the common law rule be relaxed in the case of applications for allowances. There the staff of the Securities and Exchange Commission traditionally studies the applications, inspects the diaries and other records of the applicants, audits their disbursements, cross-examines them at the court hearings and otherwise assists the court in arriving at a proper conclusion. The members of the investing public who receive notice of a hearing on allowances are entitled to rely on their interests being protected by the Commission:

> "• • • It is not improbable that in many cases objections [to allowances] would have been filed by various parties had such action by the Commission not been expected."
>
> *In re Philadelphia & Reading Coal & Iron Co.*, 1945, E. D. Pa., 61 F. Supp. 120, 125.

When the Commission's recommendations, specifically based on substantial points of law, are overruled by the District Judge and no one else seeks to appeal—the Commission itself having no right to appeal—it is in the public interest that individual securityholders should have that right, if for no other reason in order that the appellate court may consider the Commission's recommendations concurred in by such securityholders.

There is practically no authority on the subject. *Dudley* v. *Mealey* has already been mentioned.

In re Van Sweringen Corp., 1950, 6 Cir., 180 F. 2d 119, was strongly relied on by respondents below and cited by the Court of Appeals in its opinion (R. 50). The case is easily distinguishable because there the proposed attack

involved only the question of the amounts awarded and the appellate court found that there had been no abuse of discretion by the lower court, a finding in effect that the appeal prayed for was frivolous. In the case at bar, of course, no one can pretend that the appeal prayed for was frivolous, since all that petitioners sought was an adjudication on the merits of substantial points raised by the Commission before the District Court, because no one else had sought leave to appeal.

It is true that the Court of Appeals for the Sixth Circuit in the case cited used language indicating its opinion that in a Chapter X proceeding a stockholder who had not appeared before the special master or District Court at the hearings on allowances had no standing to appeal. This may be the law when the question involved is only the amount to be awarded, which is a matter within the discretion of the District Judge. But where that judge, as in the case at bar, has committed a serious error of law in contravention of the express mandate of the statute or has plainly abused his discretion in making allowances to faithless fiduciaries, overruling the recommendations of the Commission, and none of the persons who appeared in the District Court seeks to appeal, securityholders who had not so appeared should be permitted to appeal.

7. It is a matter of general importance in the administration of the Bankruptcy Act that the Court of Appeals sitting in bankruptcy as a court of equity should be directed by this Court to look through form to substance, especially in a matter involving the express statutory provisions and principles of law controlling conduct of fiduciaries.

In its opinion the Court of Appeals held that "petitioners should have intervened in the proceedings below and objected to the order which was entered." If this

meant that petitioners should have filed a formal petition of intervention the decision is in conflict with the decisions of the Third and Second Circuit Courts of Appeal upholding the denial by District Courts of petitions of intervention filed by stockholders or creditors of reorganization debtors (*In re Philadelphia & Reading Coal & Iron Co.*, 1939, 3 Cir., 105 F. 2d 358; *Dana* v. *Securities and Exchange Commission*, 1942, 2 Cir., 125 F. 2d 542).

If the Court of Appeals meant merely that petitioners should have appeared in the District Court and made a motion for rehearing upon the grounds already urged by the Securities and Exchange Commission, it was elevating useless form over substance, contrary to the traditional practice of courts of equity (2 Pomeroy on Equity Jurisprudence, 5th ed., §378 *et seq.*).

A brief reference should be made to the remarks (confessedly *obiter*: "We need not go into this" R. 49) of the Court of Appeals on the "equitable standing of petitioners." The court characterized petitioners as the holders of a "comparatively insignificant interest in tag end assets." But petitioners, having undertaken to act as 7% preferred stockholders, are the representatives of the class. "* * * It is the rule in any reorganization under Chapter X that, whenever anyone undertakes to act on behalf of any part of a class, he becomes the representative of the whole class * * *" (*Berner* v. *Equitable Office Bldg. Corp.*, 1949, 2 Cir., 175 F. 2d 218, 220). The court was mistaken in its statement that "the greater part of petitioners' interest was acquired after the order of which they complain" (R. 49). Of the 2,011 shares owned by petitioners, 1,806 shares were acquired before the entry of the order complained of (R. 44-45).

Conclusion.

This Court is presented with an extraordinary situation of general importance. The District Judge has failed to apply the express provisions of the statute and the principles of law governing the conduct of fiduciaries, although strongly urged upon him by the Commission. The Court of Appeals has refused to correct the error on the sole ground that petitioners did not intervene in the District Court to reiterate the objections already urged on that Court by the Commission.

In order to preserve the high standards of conduct in Chapter X proceedings required by the statute and by the principles of law—in regard to fiduciaries' (1) "inside trading", (2) concealment of affiliations and (3) representation of dual and conflicting interests—this Court should grant the writ.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Counsel for Petitioners.

APPENDIX A

Extracts from Bankruptcy Act, Chapter X, 11 U. S. C. A. §501 *et seq.*

§506. In general

For the purposes of this chapter, unless inconsistent with the context—

(1) "claims" shall include all claims of whatever character against a debtor or its property, except stock, whether or not such claims are provable under section 103 of this title and whether secured or unsecured, liquidated or unliquidated, fixed or contingent;

* * * * * *

(12) "stock" shall include membership, shares, and similar interests in a debtor, certificates and other evidences of such membership, shares or interests, and voting-trust certificates;

* * * * * *

* * * July 1, 1898, c. 541, §106, as added June 22, 1938, c. 575, §1, 52 Stat. 883.

§606. Persons entitled to hearings

The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees. July 1, 1898, c. 541, §206, as added June 22, 1938, c. 575, §1, 52 Stat. 894.

§608. Intervention of Securities and Exchange Commission

The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a

proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding. July 1, 1898, c. 541, §208, as added June 22, 1938, c. 575, §1, 52 Stat. 894.

§611. Statement by committees, etc., and indenture trustees

Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include—

(1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;

(2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act;

(3) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the proceeding of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof; and

(4) a showing of the claims or stock represented by such person or committee and the respective amounts thereof, with an averment that each holder of such claims or stock

acquired them at least one year before the filing of the petition or with a showing of the times of acquisition thereof. July 1, 1898, c. 541, §211, as added June 22, 1938, c. 575, §1, 52 Stat. 895.

§649. Statement of claims or stock acquired or transferred after commencement of proceeding

Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred. July 1, 1898, c. 541, §249, as added June 22, 1938, c. 575, §1, 52 Stat. 901.

§650. Appeals

Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers. July 1, 1898, c. 541, §250, as added June 22, 1938, c. 575, §1, 52 Stat. 901.

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IN THE

Supreme Court of the United States

October Term, 1958 No. 408

SIDNEY S. HENIS, HENRY H. ABRAMS, HAROLD PRINCE and PAULETTE M. PAUL,

Petitioners

v.

THOMAS C. EGAN, HARRY R. AXELROTH, FRANCIS E. WALTER, TUCKER, MAYS, CABELL & MOORE, et al.,

Respondents.

In the Matter of

CENTRAL STATES ELECTRIC CORPORATION, a Corporation,

Debtor.

BRIEF OF RESPONDENTS

Thomas C. Egan, Harry R. Axelroth, Francis E. Walter, and Tucker, Mays, Cabell & Moore, a Partnership, Counsel for 7% Preferred Committee, In Opposition to Petition for Certiorari

THOMAS C. EGAN,
1224 Lincoln-Liberty Bldg.,
Philadelphia 7, Pa.

FRANCIS E. WALTER,
House Office Building,
Washington, D. C.

DAVID J. MAYS of
TUCKER, MAYS, CABELL & MOORE,
1407 State Planters Bank Bldg.,
Richmond, Virginia.

Counsel for Respondents.

The Legal Intelligencer, 19 S. 27th St., Phila. 4.

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Respondents.

In the Matter of

CENTRAL STATES ELECTRIC CORPORATION, a Corporation,

Debtor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENTS,

THOMAS C. EGAN, HARRY R. AXELROTH, FRANCIS E. WALTER, and TUCKER, MAYS, CABELL & MOORE, a Partnership, COUNSEL FOR 7% PREFERRED COMMITTEE, IN OPPOSITION TO PETITION FOR CERTIORARI

(Emphasis in quoted matter has been supplied)

This Brief is submitted solely on behalf of the respondents who are counsel for the 7% Preferred Stock-

holders' Committee in the proceedings in the District Court. The other respondents have separate counsel who will submit a separate Brief on their behalf if they so desire.

OPINIONS BELOW

The opinion of the District Court (R. 10) is reported at 112 F. Supp. 281. The opinion of the Court of Appeals (R. 48) is reported at 206 F. 2d, 70.

JURISDICTION

28 U. S. C. A., §1254 (1) is the basis of jurisdiction.

QUESTION PRESENTED

Whether the Court of Appeals abused the discretion vested in it by par. 250 of Chapter X of the Chandler Act, 11 USCA, par. 650, in denying petitioners leave to appeal from the decision of the District Court granting allowances to the respondents who were counsel for the 7% Preferred Committee in the corporate reorganization proceedings of Central States Electric Corporation,

(a) Where the respondents admittedly rendered loyal and valuable services to the estate, and particularly to the 7% Preferred Stockholders whom they represented, and

(b) Where the petitioners were not parties to the proceedings in the District Court, did not appear therein, and did not there voice any objection to the allowances, and

(c) Where petitioners were holders of an insignificant number of participating certificates or stubs issued to the 7% Preferred Stockholders, representing the right to participation in certain residual assets, most of which stubs were acquired by petitioners after the effective date of the plan of reorganization, and a large portion of which were acquired after the date of the judgment of which they complain.

STATUTE INVOLVED

The pertinent statutory provisions are printed in Appendix A (infra, pp. 19, 20, 21).

STATEMENT

Central States Electric Corporation filed a petition for reorganization under Chapter X of the Bankruptcy Act in the District Court of the United States for the Eastern District of Virginia on February 26, 1942. The present respondents represented the 7% Preferred Stockholders' Committee from April 1943, and thereafter throughout the reorganization proceedings. A plan of reorganization was approved and confirmed effective as of June 28, 1951, and consummated.

By Order dated July 24, 1951, the District Court directed the filing of applications for final allowances for services rendered, and for reimbursement of expenses, before September 22, 1951. These were duly filed. After preliminary hearings on these applications the Securities and Exchange Commission filed an advisory report in June of 1952 making its recommendations regarding allowances. After further extended hearings and arguments

on the Commission's recommendations the District Court having considered the matter, rendered its Opinion on April 2, 1953 (R. 10).

At no time did any of these petitioners appear in the District Court and raise any objection to the granting of any of the allowances requested.

The Securities and Exchange Commission recommended to the Court that no allowances be made to respondents because of certain trading by them in stock of American Cities and Blue Ridge, subsidiaries of the debtor (R. 27), which subsidiaries, though controlled by the debtor, were themselves solvent companies with separate capital structures maintaining separate corporate existence. These subsidiaries were *not* themselves in reorganization: *Adolph Gobel*, 80 F. 2d 849; *Madison Mortgage Corporation*, 22 F. Supp. 99.

There was no question in the District Court, nor is there any question here, about the loyalty of the respondents. Counsel for the Securities and Exchange Commission, at a hearing on September 8, 1952, in the District Court made the following statement in open court:

> "We make no contention that these applicants were disloyal to their trust, or that there was any unfairness or any fraud involved. On the contrary, I believe that we have reported the fact that these applicants rendered signal service to the estate."

In pursuance of a request from the District Judge on December 17, 1952, inviting an expression of the Commission's views as to the value of services rendered by the respondents, the Commission on January 7, 1953, replied that assuming there was no legal bar to the payment of allowances to them, it was the opinion of the Commission

that the value of these services was $250,000. The District Judge made an award to the respondents in the amount fixed by the Commission. His reasons for so doing are fully set forth in his opinion (R. 10, 17, 18 and 19).

In pursuance of the plan of reorganization there was issued to the holders of the 68,880 shares of 7% Preferred stock of debtor certain participating certificates or stubs representing an interest in certain residual assets composed in large measure of a possible recovery upon claims against Harrison Williams, and any surplus in the fund reserved for fees and expenses. Thereafter these stubs were freely traded in the over the counter market and fluctuated in value, depending principally upon the fortunes of the then pending litigation against Harrison Williams. *Austrian v. Williams*, 198 F. 2d 697 (C. A. 2) decided August 15, 1952, cert. denied 344 U. S. 909 on December 22, 1952. The present petitioners hold but 2,011 of these stubs, of which all except 180 were acquired after the plan of reorganization became effective.

These petitioners not having appeared in the District Court, first questioned the propriety of allowances to respondents by presenting petitions to the Court of Appeals for the Fourth Circuit, seeking leave to appeal from the order of the District Court. While the Securities and Exchange Commission did not participate in the argument before the Court of Appeals, it made its position clear by entering its appearance and filing with the court a statement dated May 22, 1953 (referred to in the Record at page 30) in response to the petition for leave to appeal, containing the following pertinent language:

> ". . . 2. The Commission questions whether the applicants herein should be permitted to prosecute

> an appeal to this Court, since they have never appeared in the proceedings before the District Court and they made no objections to the application for fees which they now attempt to challenge. It was upon such grounds that a petition for leave to appeal from an order allowing fees in a Chapter X case was dismissed in *In re Van Sweringen Corporation*, 180 F. 2nd 119, 120 (C. A. 6, 1950). . . .

The Court of Appeals in an Opinion dated July 16, 1953 (R. 48), denied these petitioners leave to appeal stating that they had no legal right to appeal because of non-participation in the District Court proceedings, and but little equitable standing to challenge the Order of allowance to these respondents for reasons in said Opinion more fully set forth. The petitioners thereupon filed the present petition for writ of certiorari to review the action of the Court of Appeals for the Fourth Circuit.

ARGUMENT

I. The Decision of the Court of Appeals Was Correct

(a) *Appeals from allowances are discretionary.*

Appeals from allowances under Chapter X of the Chandler Act are governed by par. 250 thereof, 11 U. S. C. A. par 650, and may be taken to and "allowed by the Circuit Court of Appeals". *Dickinson Industrial Site v. Cowan*, 309 U. S. 382, established that such appeals are discretionary, the court stating, at p. 385:

> "Our view, however, is that appeals from all orders making or refusing to make allowances of compensation or reimbursement under Chapter X of the Chand-

ler Act may be had only at the discretion of the Circuit Court of Appeals. . . ."

The opinion of the Court of Appeals in this case clearly indicates that the court did not act arbitrarily but only after full consideration of the issues. For reasons therein stated, it concluded that upon both legal and equitable principles leave to appeal should be denied. The legal ground advanced by the Court of Appeals was that these petitioners had no standing to appeal because they did not appear in the District Court and oppose the allowance, or make themselves parties to the controversy in any other manner. The court likewise reached the same conclusion upon equitable grounds because of the insignificant interest which these petitioners had in the tag end assets of this reorganization, a good portion of which was acquired after the entry of the order complained of. The court also pointed out that the equitable position of petitioners was further weakened since the challenged allowance was made to counsel for the greatly benefited and non-objecting 7% Preferred stockholders in whose shoes the petitioners must stand.

(b) *Petitioners had no legal standing to appeal.*

It is a fundamental principle of appellate review that no person can bring up for review the judgment of a lower court unless he was a party to that judgment below. A leading and early case on the subject is *Payne v. Niles*, 61 U. S. 219 (1858), where this court said:

"Writs of error to remove the judgment of an inferior tribunal to this court are, under the Act of Congress, governed by the principles and usages of the common law. And it is very well settled in all common

law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can anyone be made a defendant in the writ of error, who was not a party to the judgment in the inferior court. . . ."

This Court and all other Federal Courts have consistently followed this principle. *In re Leaf Tobacco Board of Trade of N. Y.*, 222 U. S. 578; *U. S. ex rel. State of Louisiana v. Jack*, 244 U. S. 397; *United States v. Seigel*, 168 F. 2d 143; *Land v. Dollar*, 188 F. 2d 629; *Chairman of U. S. Maritime Commission v. California East. L.*, 204 F. 2d 398.

A person who has not presented his interest in a particular controversy to the court below or who has not submitted himself to that court's jurisdiction ought not to be allowed to appeal from the court's judgment. In the cases above cited, the courts indicated this was not merely a procedural matter but one of vital importance in the administration of law and that adherence to this principle is essential to the administration of justice. A failure to adhere to this principle would result in chaos or, as the Court of Appeals in this case said, "To permit such appeals would result in endless confusion." (R. 48 at p. 50).

The provisions of Par. 206 of the Chandler Act, 11 USCA §606, merely enlarge the rights of stockholders and creditors to be heard in reorganization matters, but do not confer independent appellate rights where the rights to be heard have not been exercised in the lower court. The right to appeal is an extension of and not separable from the right to be heard conferred by these provisions. A stockholder or creditor by exercising his right to be heard conferred by this section thereby becomes a party to the par-

ticular controversy in which he seeks to be heard, and if his objection is overruled he has a right of appeal from that particular judgment of the lower court. It is inconceivable, however, that this section should be so construed as to imply that every creditor and every stockholder are ipso facto parties to every controversy in bankruptcy reorganization proceedings, and that whether they appear therein or not have an appealable right from any and every order or judgment which the lower court may enter during the course of the reorganization. That is the position contended for by the petitioners in their brief but is not borne out by the cases upon which they rely. Thus in *Young v. Higbee Co.*, 324 U. S. 204, 210, supra, the Supreme Court was careful to point out that the petitioner who was involved in that proceeding did appear in the lower court and object to the confirmation of the plan. The record in the case of *In re Keystone Realty Holding Co.*, 117 F. 2d 1003 (C. C. A. 3), discloses that the petitioners there seeking leave to appeal did appear in the lower court and oppose the granting of the allowances in question, thus becoming parties to that particular controversy, and had a consequent right to appeal.

Dana v. Securities & Exchange Commission, 125 F. 2d 542, and *In re Philadelphia & Reading Coal and Iron Co.*, 105 F. 2d 358, are not contrary to this view. Those cases merely held that because of the enlargement of the rights to be heard created by Par. 206 of the Chandler Act, the lower courts did not abuse their discretion in denying committees for creditors and stockholders the right to formally intervene in those reorganization proceedings for the reasons there urged.

So also *Dudley v. Mealey*, 147 F. 2d 268 (2nd Cir.), referred to by petitioners in their brief, is not contrary to

this view, but really an affirmance of it, as the following excerpt from the opinion of the court written by Judge Learned Hand clearly indicates (p. 270),

> "Upon Hinkey's appeal the first question is of our jurisdiction. Although notice was sent to him under §170 for any approval of the Plan, he did not appear and the order under §174 was entered in his default. *Were he concluded by it, it might be argued that he should not be allowed to appeal, since he had not availed himself of the opportunity which the law gave him.* However, §180 expressly provides that approval of a plan 'shall not affect the right of . . . a creditor, indenture trustee, or stockholder to object to the confirmation of the plan.' It seems therefore an idle formality to require a creditor who failed to appear on the first hearing, but who must be given notice of the second, to wait until the plan comes up for confirmation in order to raise any objections, which are apparent on the face of the plan. . . ."

Thus, wherever the right to appeal has been recognized as a corollary of the right to be heard, the party seeking to appeal actually became a party to the controversy in the lower court by participating in the proceedings there.

Where, however, a stockholder failed to appear and object in the lower court, his right to appeal from the judgment was denied: *In re Van Sweringen Corporation*, 180 F. 2d 119 (6th Cir.). The question there arose upon a petition for leave to appeal from an order of the District Court in respect to fees allowed trustees and attorneys in a reorganization proceeding under Chapter X. Despite the fact that both the Securities and Exchange Commission and a creditor had objected to the fee allowances in the lower

court, the non-appearing stockholder was held not to be entitled to appeal, the court stating, page 120:

> "In respect to the order allowing fees to the trustees and their attorneys in excess of that recommended by the Master, she has no standing as an appellant for the reason that she was not a party to the proceedings before either the Master or court in which the fees of the trustees and attorneys were recommended or allowed. It is elementary that no one may bring up for review in an appellate court the judgment of an inferior court unless he was a party to the proceedings below. Payne et al. v. Niles et al., 20 How. 219, 61 U. S. 219, 15 L. Ed. 895; U. S. v. Seigel, 83 U. S. App. D. C. 88, 168 F. 2d 143."

The fact that others, be they stockholders, creditors or the Securities and Exchange Commission, may have appeared in the lower court and voiced objections to the particular judgment complained of, does not give those who did not do so the standing of parties to the lower court proceeding, so as to enable them to appeal therefrom as decided in *In re Van Sweringen Corporation*, supra. A similar result was reached by this court, under former Section 77-b of the Bankruptcy Act, in *Meyer v. Kenmore-Granville Hotel Co.*, 297 U. S. 159, where the Supreme Court affirmed the Circuit Court's denial of petitioner's application for leave to appeal on the ground that petitioner, who alone sought leave to appeal, had not objected to the plan in the Bankruptcy Court, and so was not in a position to challenge the plan on her own behalf or on that of bond holders who had objected.

The fact that the Securities and Exchange Commission opposed the allowances in the District Court should not

avail these petitioners. The various classes of creditors and security holders in a corporate reorganization under Chapter X have divergent and conflicting interests, particularly where the debtor is hopelessly insolvent. The Commission frequently recommends to the court action which is contrary to the wishes and interests of particular groups of creditors or security holders, particularly in cases where it approves plans denying such groups participation either in whole or in part. It is, therefore, idle to say, and indeed it is not arguable, that the Securities and Exchange Commission was given its status in Chapter X proceedings in order that it might represent any one group or all of the security holders. Its role is similar to that of *amicus curiae* with full power to be heard in all matters, or as the Supreme Court has stated in *Manufacturers Trust Co. v. Becker*, 338 U. S. 304, 315, the Commission is "the statutory advisor to the court".

Of course, the estate is not without appellate remedy. In Bankruptcy generally the estate is the aggrieved party, and the trustee as its representative is the proper party to prosecute an appeal from orders for allowances because it is the trustee's duty and he is the proper person to see to it that no unjust or fictitious claims are allowed to be paid out of the assets in his hands: *Levin v. Barker*, 122 F. 2d 969, 971, 972 (8th Cir.). Under former Section 77-b of the Bankruptcy Act it was firmly established that orders fixing allowances were appealable by the trustee: *Christian v. R. Hoe & Co., Inc.*, 79 F. 2d 541 (2nd Cir.). Chapter X of the Chandler Act did not change the law in this respect. The trustees here had an unquestioned right to maintain an appeal from the order fixing allowances. They did not appeal.

The petitioners did not become parties to the controversy in the District Court, either by intervention as

parties in interest (Par. 207, 11 U. S. C. A., Par. 607) or by appearing in the court below as stockholders (Par. 206, 11 USCA, Par. 606) and seeking relief. The Court of Appeals was justified, therefore, in concluding as it did in its opinion (R. 48, 49) that these petitioners had no legal right to maintain the appeal.

(c) *Denial of leave to appeal was justified on equitable grounds.*

The Court of Appeals stated in its opinion, *inter alia* (R. 49):

> "Under the plan of reorganization the 7% preferred stockholders were paid approximately $198 per share and were issued participation certificates or 'stubs' giving the holders the right to participate in certain residual assets. Petitioners hold only 2,011 of these 'stubs', as against 68,880 outstanding, and all except 180 of these were acquired long after the plan of reorganization had become effective. As these petitioners are the holders of a comparatively insignificant interest in tag end assets and as the greater part of even this interest was acquired after the order of which they complain and represents nothing more than buying into a lawsuit, they have little equitable standing to challenge that order. Particularly is this true where the challenge relates principally to the allowance made counsel for the 7% preferred stockholders, in whose shoes the stub holders must stand, who profited greatly from the services of counsel and who voiced no opposition to the allowance when it was made. . . ."

It is obvious that the Court was of opinion that application of equitable principles would necessitate a disallowance

of the appeal even though petitioners had a legal right to prosecute it.

Respondents were counsel for the 7% Preferred Stockholders' Committee. 68,880 shares (par $100.) of this class of stock was outstanding, representing a total dollar investment of $6,880,000. This is neither the time nor the place to detail the character of the services by respondents which benefited the estate as a whole and particularly the 7% Preferred stockholders whom they represented. At the time the reorganization proceeding was instituted the interest of the 7% stockholders was under water to the extent of $16,000,000. Upon reorganization these stockholders were paid approximately $198. for each share of stock held by them or as a group in excess of $13,000,000., and in addition received stubs having more than a nominal value. The value of the services of the respondents which contributed to this result, unparalleled in reorganization history, has been fixed by both the Securities and Exchange Commission and the District Court as being $250,000., and has not been questioned.

The holdings of these petitioners in participation certificates or stubs is set forth in the statement of their counsel, Ralph Montgomery Arkush, Esquire, filed on June 10, 1953 in the Circuit Court of Appeals (R. 44-45). According to it all of the petitioners then owned a total of 2,011 stubs. Of these only a total of 180 were acquired by two of the petitioners prior to the effective date of the plan of reorganization. According to the transfer agent, whose records are presumably correct, only 100 shares, belonging to petitioner Henis, were acquired prior to the plan date (R. 42-43). Adopting Mr. Arkush's statement, however, petitioner Sidney S. Henis acquired 50 shares in October 1949, which was 7½ years after the petition for reorganization was filed in this case, and another 130 shares of

stock were acquired by Mr. Henis and Mr. Abrams during the early part of 1951, shortly before the confirmation of the plan of reorganization. These 180 shares represent .0026% of the total 7% Preferred stock outstanding. The remainder of the stubs held by these petitioners were acquired after the confirmation of the plan. Of the 2,011 now owned, a total of 605 stubs were acquired by three of the petitioners, after the decision of the District Court which was handed down on April 2, 1953. As to petitioner Harold Prince, the statement discloses that he acquired his 205 stubs on May 1, 1953 which was after the date of the judgment of the District Court, and there is no doubt that he is not "aggrieved" thereby. Clearly, he has no standing as a party in these proceedings. As to all, the Court of Appeals was justified in denominating them as being the holders of a comparatively insignificant interest in tag end assets, the acquisition of the greater part of which interest was nothing more than buying into a lawsuit. Cf. *Ortion v. Austrian*, 166 F. 2d 939, and *In re Commonwealth v. Southern Corporation*, 186 F. 2d 708.

Assuming that these petitioners, or any of them, have a legal standing to appeal, the Court of Appeals in the exercise of the discretionary power vested in it by Congress in denying them leave to appeal could take into consideration the fact that none of them made any effort to assert their rights in the District Court but initially attempted to litigate this controversy in the appellate court. This was in effect the ruling of this Court in the case of *Meyer v. Kenmore-Granville Hotel Co.*, 297 U. S. 159, 80 L. Ed., 557, supra, where the Circuit Court had denied a bondholder petitioner leave to appeal from the confirmation of a plan of reorganization under former Section 77-b on the sole ground that she had not availed herself of her right to

appear in the lower court and object to the confirmation of the plan. This court affirmed, thus deciding that the failure to appear in the lower court and make objection there is sufficient ground for the Circuit Court's exercise of its discretion to deny leave to appeal. We submit that this decision is controlling here.

Furthermore, the 7% Preferred stockholders are the only group of security holders of the debtor entitled to share in the residual assets. The allowances to these respondents are, therefore, in reality being paid by the 7% Preferred stockholders whom they represented and who greatly benefited from the services of the respondents. Stub holders, as successors in interest, stand in the shoes of these stockholders. To deny these allowances would merely enable these petitioners, who purchased these stubs for speculation, to enrich themselves at the expense of those who rendered admittedly beneficial services to the estate.

We submit that the foregoing equitable considerations justified the denial of leave to appeal.

II. Respondents Were Faithful Fiduciaries

We have not attempted in this brief to argue the merits of the controversy in the District Court. Suffice to say that upon a reading of the entire record of this case the charge made against us in petitioner's application for certiorari to the effect that we were "faithless fiduciaries" has no substantiation whatsoever, and is entirely negatived by the report of the Securities and Exchange Commission and the opinion of the District Court.

Since petitioners have devoted so much space to a discussion of Section 249 of the Chandler Act, while we do not believe this the time and place to raise that issue, we submit that the section does not require construction.

By its terms, it prohibits trading in claims against or stock "of the debtor". Debtor is defined in §106 of the Act as the person by whom or against whom a petition in reorganization has been filed under Chapter X. The legislative history indicates that this limitation as to trading was designedly incorporated in this provision to make clear that what was prohibited by this quasi penal provision was trading in stock of or claims against the debtor corporation, and not of any other corporations. Certainly Congress, had it so desired, could easily have expressly included subsidiaries, by apt phraseology and definition (cf. §106(13) and §129 of Chapter X), as it has done in Section 17 of the Public Utility Holding Company Act, 15 U. S. C. A., par. 79-q, and in Section 16 of the Securities and Exchange Act, 15 U.S.C.A., par. 78-p, where prohibitions against trading in subsidiaries are expressly stated. Nor is there any compelling need to construe this section as including subsidiaries generally or in particular factual situations, because, under general equitable principles, the court always has power to take into consideration such conduct of fiduciaries in determining the quantum of compensation or denying it altogether in a proper case: Restatement of Trusts, par. 243.

Be that as it may, we do not in this case, and upon this record, reach that question because as demonstrated above, the Court of Appeals has properly concluded that these petitioners have no standing to maintain this appeal.

III. No Basis Exists for the Grant of Certiorari

There is, therefore, no important question of Federal law hitherto undecided presented in this case. The discretionary power of the Court of Appeals to permit or deny

leave to appeal in a case of this kind has been well established by decisions of this court. The denial of leave to appeal by the Court of Appeals in this case was based upon well recognized legal and equitable principles in conformity with decisions of other federal courts and of this court. Nothing is presented of national significance or importance. No questions are presented whose resolution would have immediate importance beyond the particular facts and parties here involved. The Court of Appeals has accepted and followed the discretionary power vested in it by Congress under Par. 250 of Chapter X of the Chandler Act, relating to appeals from allowances. Such obedience presents no grounds for review by writ of certiorari, particularly where petitioners themselves do not allege or attempt to show that there was an abuse of discretion in the lower court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS C. EGAN,
FRANCIS E. WALTER,
DAVID J. MAYS,
Counsel for Respondents.

APPENDIX A

Extracts from Bankruptcy Act, Chapter X, 11 U. S. C. A. §501 et seq.

§506. *In general*

For the purposes of this chapter, unless inconsistent with the context—

* * * * *

(5) "debtor" shall mean a corporation by or against which a petition has been filed under this chapter;

* * * * *

(13) "subsidiary" shall mean a corporation substantially all of whose properties are operated under lease or operating agreement, or the majority of whose stock having power to vote for the election of directors, trustees, or other similar controlling bodies is owned, directly or indirectly, through an intervening corporation or other medium, by another parent corporation, a petition by or against which has been approved. July 1, 1898, c. 541 §106, as added June 22, 1938, c. 575, §1, 52 Stat. 883.

§529. *Same; subsidiary corporation*

If a corporation be a subsidiary, an original petition by or against it may be filed either as provided in section 528 of this title or in the court which has approved the petition by or against its parent corporation. July 1, 1898, c. 541, §129, as added June 22, 1938, c. 575, §1, 52 Stat. 886.

§606. *Persons entitled to hearings*

The debtor, the indenture trustee, and any creditor or stockholder of the debtor shall have the right to be heard

on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees. July 1, 1898, c. 541, §206, as added June 22, 1938, c. 575, §1, 52 Stat. 894.

§607. *Intervention of parties; notices generally*

The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given. July 1, 1898, c. 541, §207, as added June 22, 1938, c. 575, §1, 52 Stat. 894.

§649. *Statement of claims or stock acquired or transferred after commencement of proceeding*

Any person seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the preceeding in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior

consent or subsequent approval of the judge, been otherwise acquired or transferred. July 1, 1898, c. 541, §249, as added June 22, 1938, c. 575, §1, 52 Stat. 901.

§650. *Appeals*

Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers. July 1, 1898, c. 541, §250, as added June 22, 1938, c. 575, §1, 52 Stat. 901.

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 408...

SIDNEY S. HENIS, HENRY H. ABRAMS, HAROLD PRICE and PAULETTE M. PAUL,
Petitioners,

THOMAS C. EGAN, HARRY R. AXELROTH, FRANCIS E. WALTER, TUCKER, MAYS, CABELL & MOORE, a Partnership, BOYLE, FELLER, STONE & McGIVERN, a Partnership, JAMES P. REEVES, HUGH A. KELLY, FRED C. RUDGE, JOHN V. ROBINSON, EDWARD GOULD, LEONARD L. COWAN and WILLIAM P. DOYLE,
Respondents.

IN THE MATTER
OF
CENTRAL STATES ELECTRIC CORPORATION,
a Corporation,
Debtor.

Brief in Opposition to Petition for Writ of Certiorari for Boyle, Feller, Stone & McGivern, a Partnership, James P. Reeves, Hugh A. Kelly, Frank C. Rudge, John V. Robinson and Edward Gould, Respondents.

THOMAS F. BOYLE,
Attorney for Boyle, Feller, Stone & McGivern, a Partnership, James P. Reeves, Hugh A. Kelly, Fred C. Rudge, John V. Robinson and Edward Gould, Respondents.

BOYLE, FELLER & REEVES,
JAMES P. REEVES,
Of Counsel.

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Opinions Below.

The opinion of the District Court of the United States for the Eastern District of Virginia (R. 10) is reported at 112 F. Supp. 281. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 48) is not yet reported.

Jurisdiction.

The order of the Court of Appeals for the Fourth Circuit was entered on July 16, 1953 (R. 52). The jurisdiction of the Court is invoked under 28 U. S. C. A. Sec. 1254 (1).

Questions Presented.

1. Has the Court of Appeals abused its discretion in denying the application of individual stockholders of a corporation reorganized under Chapter X of the Bankruptcy Act for leave to appeal an order providing for payment of Committee allowances and counsel fees, where said stockholders have failed to intervene in the District Court proceedings?

2. Is the Court of Appeals in error in refusing to grant leave to appeal from an order of a District Court awarding fees to a stockholders' committee and its attorneys, on the ground that the District Judge abused his discretion in issuing an order allowing fees, in view of the fact that the Securities and Exchange Commission had recommended that no fees be paid and where the Court heard all the evidence relating to charges levelled at the Committee by the Commission?

Statement and Question Presented.

The Kelly Committee for the 6% Preferred stockholders of Central States Electric Corporation were awarded a fee of $500.00. The Secretary to the Committee was awarded a fee of $750.00. Counsel for the Committee were awarded a fee of $15,000.00 plus disbursements (R. 37). Counsel expended 3,360 hours and have been paid the fee

by the Trustees after the Court of Appeals rendered decision. The petitioners failed to obtain a stay.

The question presented, as defined by petitioners, precludes any argument on the merits. Nevertheless, petitioners' brief deals extensively with the merits of their claim that the District Court abused its discretion in failing to blindly follow the recommendation of the Securities and Exchange Commission. However, nothing is presented in the record before this Court to substantiate these charges other than the novel inclusion of self-serving excerpts from petitioners' brief filed with the Court of Appeals (R. 24-29).

Therefore, respondents will confine their argument to the propositions: (1) the Court of Appeals was correct in holding that the petitioners have no standing on appeal because of their failure to intervene in the District Court, (2) the Court of Appeals gave consideration to the merits of the argument that the District Judge abused his discretion before rendering a decision, and (3) the petition should be denied because the question presented is inadequately stated and fails to comply with Supreme Court Rule 38(2), and (4) no important Federal question is presented for the consideration of the Supreme Court.

Petitioners' leave to appeal to the United States Court of Appeals for the Fourth Circuit on May 15, 1953 constituted their initial appearance in this proceeding. Neither the stockholders nor their counsel, R. Montgomery Arkush, had heretofore taken any part in said proceedings (R. 37).

The petitioners were adequately represented in the proceeding by the 7% Preferred stockholders committee, which, since 1943 nursed and protected with avidity the interest of the 7% Preferred stock, to the extent that its value rose from thirty cents per share to approximately $190.00 per share (R. 15). In addition, the Trustees ac-

tively participated in the hearings on fee application and were alert to the implication of the report filed by the Securities and Exchange Commission. Neither the Trustees nor the 7% Committee, after hearing the evidence elicited in open court, saw reason to oppose the application of the Kelly Committee or counsel, for fees. By keeping silent they, in effect, agreed with the findings of the District Court (R. 40). In describing the petitioners' position in this proceeding no improvement could be made on the words of the Court of Appeals, when it said in its opinion:

> "These petitioners are the holders of a comparatively insignificant interest in tag end assets and as the greater part of even this interest was acquired after the order of which they complain and represents nothing more than buying into a law suit, they have little equitable standing to challenge that order" (R. 49).

The triviality of petitioners' claim of representing the whole class of 7% Preferred stock, and the recentness of their stock acquisition is adequately set forth in the record (R. 35, 36, 38, 42, 43, 49).

PROCEEDINGS IN THE DISTRICT COURT:

The District Court, after days of testimony, concluded that no conflict of interest existed between the fee applicants and other classes of security holders. In fact, the Court found that a "community of interest" existed between the 6% Preferred stockholders and the Common stockholders (R. 15).

Throughout the proceeding the 6% Preferred stock and Common stock were both "under water". There were never sufficient assets in the estate to pay off the claims of prior security holders, the expenses of reorganization,

and leave anything for the junior security holders. The representatives of both classes of stock realized that their hope of salvation rested upon either of two possibilities, or perhaps a combination of both, viz: (1) Delay the reorganization until the stock market rose to a sufficient height to bolster up the value of the underlying assets of the estate to enable the junior security holders to participate in the reorganized company. (2) Pour new cash into the debtor corporation by means of an underwriting, and thereby stave off the liquidation of the estate and freezing out of the interests of the junior security holders.

As in the case of *Cromwell* v. *Curtis*, 2 Cir. 99 F. 2nd 810, a community of interest rather than a conflict of interest existed. *Cromwell* v. *Curtis* was a case involving the reorganization of the Menati Sugar Company, where the Court considered the payment of fees to counsel who at one stage of the proceedings represented both the debtor and a committee of bondholders. Judge Learned Hand appropriately said:

> "The bondholders and shareholders were in one boat, and that a very leaky one; their interests were common and there can be no valid objection to the attorneys for the company being paid for whatever they did to keep the craft afloat."

Petitioners' statement in page 5 of their brief, that "the committees had concealed" the true identity of the stockholders, is not a factual representation of the contents of the record. In support of this charge petitioners merely cite (R. 29) which happens to be a quotation of the self-serving remarks contained in their own brief used in the Court of Appeals. The position of the Kelly Committee and its counsel is adequately set forth in the record (R. 40, 41), and in pages of testimony included in the record before the Court of Appeals which petitioners have not seen fit to include in the record before this Court.

The District Court clearly absolved the Kelly Committee and its counsel from any taint or suspicion of not acting in good faith. The extent of its censure, if any, is directed at and limited to "those participating behind the scenes". The court stated that those persons not only did not disclose their full status to the Court, but also failed to disclose their full status "to those who acted for them in a representative character" i.e. the 6% preferred stockholders committee and its counsel (R. 16). The Court, after considering the recommendations of the Securities and Exchange Commission, statements and testimony of the parties involved and its own observation of the conduct of the case, decided that the Kelly Committee and its counsel were entitled to a fee for services rendered. The District Court was not bound to follow the recommendations of the Commission. *In re Detroit International Bridge Co.*, 6 Cir., 111 Fed. 2d 235; *Cooke* v. *Bowerstock*, 8 Cir., 122 Fed. 2d 977, 985.

According to the statement made in the petition for certiorari, the sole question presented is whether the Court of Appeals abused its discretion in denying petitioners' application for leave to appeal because the petitioners had not intervened and made themselves parties to the proceedings in the District Court. This is an incorrect presentment of the question to be decided by the Supreme Court, because there is no certainty that the Court of Appeals predicated its decision solely upon the procedural aspect of the case.

The petitioners have failed to include in the record presented to this Court, any part of the record which was before the Court of Appeals, which dealt at length with the merits of the charges that the respondents should be disallowed a fee because of an alleged conflict of interest between the Committee and other stockholder groups, and because of an alleged failure of the respondents to prop-

erly file the statement required by Section 211 of the Bankruptcy Act.

The record containing the complete testimony and evidentiary exhibits concerning the merits of the argument raised in the Court of Appeals that the District Judge abused his discretion by awarding fees was before the Court of Appeals. The Court of Appeals insisted upon hearing arguments upon the merits of the case and obtaining briefs on the question of whether the District Judge abused his discretion, before rendering its decision upholding the District Court order awarding fees to the respondents.

In spite of the fact that the Court of Appeals had the complete record before it, dealing with the merits of the argument of why fees should or should not be paid, and in spite of the fact that said Court received briefs and heard lengthy argument dealing with this subject, the petitioners now claim that a writ should be issued because the Court of Appeals abused its discretion by deciding the petition for leave to appeal without giving consideration to the arguments concerning the merits of the case. This is a distinctly false impression to give this Court.

POINT I.

The petitioners, by failing to appear in proceedings in the District Court, are barred from taking an appeal.

Much is said in petitioners' brief concerning the fiduciary obligations of stockholders' committees and the sanctity of the trust imposed upon them. In failing to discuss this axiomatic proposition, the Court, we trust, will not regard this omission as a lack of regard for the sacredness of such trust. The point in issue is whether

the petitioners, who are mere interlopers, may at this late date take an appeal. The respondents do not contend that a stockholder cannot have his day in Court if he timely exercises such right. Actually, stockholders other than the petitioners have appeared in Court throughout the length of this proceeding. They have attacked the Trustees' plan, appealed from the District Court's order approving such plan, and from the confirmation order of the Court of Appeals. Neither respondents nor any other party to this proceeding have ever taken the position that stockholders do not have a right to appear *pro se,* and respondents do not now contend that the petitioners have not the right to their day in Court, *providing* exercise of the right to intervene is timely made.

The report of the Securities and Exchange Commission recommending that respondents be denied fees, was dated and filed with the District Court, and thereby became a public record, on or about June 16, 1952. Thereafter, testimony was taken in open Court concerning the right of respondents to a fee, during July, 1952. All parties to the proceeding were permitted to appear, give testimony and engage in cross-examination of respondents and their witnesses. They were allowed to record their objections with the Court concerning proposed fees to be paid to respondents, if they desired to do so. Petitioners, however, took no part in the proceeding. It was not until April 23, 1953, ten months after the S. E. C. filed its recommendation on fees, that the District Court filed the order awarding payment of fees, the subject of this appeal. During that period of time petitioners never intervened or in any manner or form appeared in the case. The petitioners knew that the Commission is not permitted to take an appeal. Why then did not the petitioners file a statement required by *Section 211* of the Bankruptcy Act, appear in this proceeding, avail themselves of the

right to object to the payment of fees, and thereby protect their right to appeal? The lack of time certainly cannot be the cause of this dereliction. Ten months should have been plenty of time to take action.

As stated in the case of *In re Van Sweringen et al.*, 6 Cir., 180 Fed. 2d 119:

> "It is elementary that no one may bring up for review in an appellate court a judgment of an inferior court unless he was a party to the proceedings below".

In that case the petitioners filed a petition with the Court of Appeals for leave to appeal from an order of the District Court, respecting fees allowed to Trustees and attorneys in a reorganization pursuant to Chapter X of the Bankruptcy Act. The petition was denied. See also *Payne* v. *Niles*, 61 U. S. 219, 15 L. Ed. 895; *United States* v. *Siegel*, 83 U. S. App. D. C. 88, 168 Fed. 2d 143; *United States ex rel. Louisiana* v. *Jack*, 244 U. S. 397, 402, 61 L. Ed. 1222, 1227.

In *Zell* v. *Circuit Court of U. S.*, 203 U. S. 577, 51 L. Ed. 325, affirming order of the Court of Appeals refusing mandamus in *Fink* v. *Bay Shore Terminal*, 4 Cir., 144 Fed. 837, it was held that the Court of Appeals does not have to permit a bondholder to intervene for the purpose of taking an appeal. The bondholder was represented by a trustee of the mortgage securing the bonds. In refusing leave to appeal the Court pointed out that no fraud or collusion was charged against the trustee and no cause was shown by the petitioner from which the Court could find that the actions of the trustee were not entirely proper. The Court then pointed out that no appeal lies from discretionary action of the court below.

The argument that the petitioners "as real party in interest" should be allowed to appeal was expressly nega-

tived in *United States* v. *Siegel,* 83 U. S. App. D. C. 88, 168 Fed. 2d 143, 146. The Court in its opinion said:

> "We can see nothing but chaos resulting from such a holding. Any exception which we might make in the case at bar would apply equally as well to any other person not joined as a party but in whose behalf an action was instituted and to all other institutions mentioned in Rule 17a, executives, administrators, guardians, trustees, and parties with whom or in whose names contracts are made for the benefit of others."

The case of *Dudley & Mealy,* 2 Cir., 147 Fed. 2d 208 cited by petitioners on page 10 of their brief as authority for permitting a stockholder to appeal when he has not intervened in the proceeding in the District Court is clearly distinguishable from the case at bar. In *Dudley* v. *Mealey* a bondholder had not raised an objection on hearings in the District Court concerning approval of a plan of reorganization in a Chapter X proceeding. Because of the fact that *Section 180* of the Bankruptcy Act permits a bondholder to object to confirmation of a plan even where he has not objected to approval of the plan, he will be allowed to appeal from the order of approval rather than wait until the plan comes before the court for confirmation and take an appeal from the order of confirmation. In that case the matter was still *sub judice* before the District Court and because of that fact the bondholder's intrusion on approval of the Plan was considered proper rather than forcing him to wait until the Plan come up for confirmation before the same court.

The petitioners were represented in the District Court by the 7% stockholders committee and the Trustees in bankruptcy.

POINT II.

The petition should be denied because it inadequately certifies the question presented as is required by Supreme Court Rule 38(2).

The question presented is not clear cut, concise and definitely phrased as is required by *Rule* 38. Furthermore, it fails to disclose the fact that the record abounds with facts which may have had a material bearing upon the Court of Appeals in reaching its decision disallowing the petitioners leave to appeal. There is no disclosure in the brief or record presented to this Court that the Court of Appeals had before it complete testimony and exhibits concerning whether or not the District Judge abused his discretion in making his decision. Under such circumstances, it has been the practice of this Court to disallow a petition for certiorari.

> *Atlas Life Insurance Co.* v. *Southern Inc.,* 306 U. S. 563, 572, 83 L. Ed. 989, 993;
> *Triplett* v. *Lowell,* 297 U. S. 638, 649, 80 L. ed. 949, 956;
> *Wilshire Oil* v. *United States,* 295 U. S. 100, 79 L. ed. 1329.

Where the question presented contains more than a single question, it is not a proper presentment of a question to the Supreme Court, and should not be answered by the Court.

> *Quinlan* v. *Green County,* 205 U. S. 410, 419, 51 L. ed. 860, 863.

The law involved in considering whether or not representatives of the 7% Preferred stockholders should be barred

from receiving a fee is different from the law involved in deciding whether the representatives of the 6% Preferred stockholders should receive a fee. The 7% Preferred stockholders' representatives have traded in capital stock of a subsidiary of the debtor. The 6% Preferred stockholders' representatives were accused of acting in concert with common stockholders, and thereby raised an issue of conflict of interest.

In addition, the procedure of handling the appeals of the representatives of the two classes of stock would be different. The legal problem of whether trading in securities of a subsidiary is a bar to receiving a fee could be summarily decided by the Supreme Court. However, if this Court decided that the Court of Appeals abused its discretion in not granting leave to the petitioners to appeal, it might desire to handle the case of the representatives of the 6% Preferred stockholders differently. In such event the Court might decide to remand the case to the Court of Appeals for a determination whether the District Judge abused his discretion in awarding fees to the Kelly Committee and its counsel.

Thus, the facts, the law involved, and the procedure of handling the appeal is different in the cases of the two classes of respondents. Yet the petitioners jumble both cases together into a single question presented to this Court for decision.

POINT III.

No important point of Federal law is involved in the question presented.

The failure of a litigant to timely intervene in a proceeding and properly comply with the rules of procedure concerning the taking of an appeal, where such litigant

had full opportunity and ample time to comply with such requirements, does not involve an important Federal question.

The issue before the Court is not the proposition that committees must conduct themselves as fiduciaries. The question presented is merely whether the Court of Appeals must allow litigants to appeal when they have failed to intervene in the District Court. That is not an important Federal question requiring the consideration of the Supreme Court.

If a stockholder who has not appeared in the District Court be allowed to appeal on the theory that he is the real party in interest, all beneficiaries would claim a similar right to appeal where they have been represented in an action by a Trustee, executor, administrator or other person acting in a representative capacity. There would be no end to chaos. *United States* v. *Siegel,* 83 U. S. App. D. C. 88, 168 F. 2d 143; *Zell* v. *Circuit Court of U. S.* 203 U. S. 577, 51 L. ed. 325, affirming *Fink* v. *Bay Shore Terminal,* 4 Cir., 144 Fed. 837. Whether or not stockholders in a reorganization under Chapter X of the Bankruptcy Act are to be granted a right to appeal when they have failed to appear and present their views to the District Court is an unusual prerogative which should be clearly prescribed by act of Congress. Until enactment of such legislation the courts should follow the time honored precedent that in order to appeal one should be required to intervene in the District Court proceeding and properly note objections.

Conclusion.

No conflict with decision here or elsewhere, and no question worthy of further review is presented. The order of the court below should be affirmed, and petition for certiorari denied.

Dated: November 6, 1953.

Respectfully submitted,

THOMAS F. BOYLE,
Attorney for Boyle, Feller, Stone & McGivern, a Partnership, James P. Reeves, Hugh A. Kelly, Fred C. Rudge, John V. Robinson and Edward Gould, Respondents.

BOYLE, FELLER & REEVES,
JAMES P. REEVES,
of Counsel.